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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

LAWRENCE L. GHIDONI,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination precludes forcing a criminal defendant to execute a sworn form directing a foreign bank to produce records of any account in which he is a "principal," when the criminal case against that defendant substantially rests upon the defendant's alleged control over the foreign accounts.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on May 2, 1984.

CITATIONS TO OPINION BELOW

The unreported decisions of the district court, dated December 30, 1983, and January 31, 1984, are found in Appendix "A" to this petition. The decision of the Court of Appeals dated May 2, 1984, and reported at 732 F.2d 814 (11th Cir. 1984) is found in Appendix "B" to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1984. A timely suggestion for rehearing en banc was denied on June 8, 1984. The jusridiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT

1. On October 5, 1983, a grand jury for the Northern District of Florida returned a four-count indictment charging the petitioner Ghidoni with two tax offenses for each of the years 1976 and 1977. Essentially, the indictment alleged that Ghidoni had willfully underreported his corporation's gross receipts and his own personal income for each of those years.

The charges against Ghidoni chiefly hinge upon funds generated through business transactions (predominantly involving building materials) between Ghidoni's corporation and a Middle Eastern trading group. As a result of those transactions, the government alleges, monies were deposited in a bank account maintained by a branch of the Bank of Nova Scotia located in The Cayman Islands. A crucial issue in the case against Ghidoni is how the Cayman funds should be characterized. The government's theory is that the funds were gross receipts to Ghidoni's company and, ultimately, personal income to Ghidoni. Thus, a factual issue of paramount importance is the nature and extent of Ghidoni's interest in the Cayman accounts. Control over the funds is crucial, as the government has consistently acknowledged throughout this case. *See* Brief for the United States at 4-6, *United States v. Ghidoni,* 732 F.2d 814 (11th Cir. 1984).

In an effort to secure the Cayman bank's records and, potentially, the testimony of bank officials concerning those accounts, the government adopted two separate approaches. First, the government issued a trial subpoena for the records, and served the subpoena upon a bank official at a branch of the bank located in Miami, Florida. In response to that subpoena, an attorney for the bank wrote a letter to the government informing it "about some complications that may be presented if [the subpoenaed] documents are found to exist." The letter pointed out the Cayman Islands' Confidential Relationships Law, which carries potential criminal sanctions for disclosure

of the kind called for in the government's subpoena. The letter further advised the government of a waiver provision in the Confidential Relationship Law, allowing disclosure upon the "consent, express or implied, of the relevant principal."

In light of the bank's position on the matter, the government then filed the motion that ultimately led to this petition. That motion sought an order from the district court compelling Ghidoni to execute a "Direction" form authorizing bank officials to allow the government access to the accounts. In an appendix to its motion, the government produced copies of its correspondence with the bank's attorney. The government then asserted that the order that it sought presented the preferable course of action, due to the restrictions of Cayman law and the potential time expense of litigating over the subpoena issued to the bank.

Ghidoni filed a written response to the government's motion, contending *(inter alia)* that the Fifth Amendment's self-incrimination clause forbids compelling a testimonial act that may tend to furnish a link in the chain of evidence against an accused. After hearing oral argument on December 22, 1983, the district court took the matter under advisement. On December 30, 1983, the court issued an order overruling Ghidoni's objections and commanding him to execute the form. [App.A, pp. A-1 - A-10].

Through counsel, Ghidoni notified the government that he would persist in his objection and would refuse to sign the "Direction" form. Accordingly, the district court held a show-cause hearing on January 31, 1984. The facts were of course undisputed, and the court held Ghidoni in civil contempt, basing its order upon its inherent powers and upon 28 U.S.C. §1826 (1982). [App.A, p. A-11] The court also noted, however, that the question was a close one and that an appeal on the issue would be neither frivolous nor dilatory in purpose. [App.A, p. A-12] The court stayed any confinement sanctions against Ghidoni pending appeal, requiring him to post security with court as a condition of staying confinement. The district

court has extended that stay pending disposition of this petition.

2. By a divided vote, the Court of Appeals affirmed Ghidoni's contempt citation. The majority correctly noted that the privilege against self-incrimination attaches when three conditions simultaneously exist: (1) a compelled act of (2) testimonial communication that is (3) incriminating to the communicating party. 732 F.2d at 816 (citations omitted). Observing that the compulsion element was obvious, the majority then characterized the issue before the court as "whether signing the form is testimonial communication." *Id.* Answering that question in the negative, the court found it unnecessary to address the "incrimination" issue.

The majority initially noted that Ghidoni had never asserted that the bank records sought by the government were intrinsically protected by the Fifth Amendment. In other words, Ghidoni's claim of privilege focused upon the compelled execution of the consent form; he did not contend that anything about the records themselves rendered them constitutionally inaccessible. From that proposition, the majority turned its attention to whether the signing of the form constituted a testimonial act.

The majority's analysis focused upon three possible uses of the consent form in the case against Ghidoni: (1) its implication that the bank accounts do, in fact, exist; (2) its tacit admission that Ghidoni actually exercises control over the accounts; and (3) its tendency to authenticate any records actually produced. The court then rejected the notion that any of these three considerations rendered the form objectionable. As the majority noted, the form itself was drafted in conditional terms -- "if any of the records sought do in fact exist, then you have my consent to produce them" -- and thus, Ghidoni would admit neither existence nor control over the accounts by executing the form. And since any records produced would come from a third party and not from Ghidoni himself, the majority reasoned, Ghidoni would not be authenticating those records

for use against himself. For those reasons, the court held, signing the form would not be a testimonial act.

In dissent, Judge Clark found the majority's analysis too narrow. To evaluate the "testimonial" question properly, the dissent pointed out, one *must* focus upon the content of the form that Ghidoni is compelled to sign, and evaluate whether that content is to be used in a communicative manner. Judge Clark recognized the correctness of the majority's observations, standing alone, but noted the underlying flaws in the majority's analysis of the issue:

> As the consent form is worded, Ghidoni does not concede that any foreign account exists, or that any records a foreign bank may have are genuine. But that is beside the point. Ghidoni is not being asked to produce bank records, and so the testimonial aspects attendant to compelling the act of producing such records articulated in [*United States v. Doe*, - U.S. -, 104 S.Ct. 1237 (1984)], are irrelevant here. We are concerned not with the act of signing a consent form, but with the substance of the consent form itself, which communicates to all banks presented with the form: "I consent to have you release any account information you deem applicable to me."

United State v. Ghidoni, 732 F.2d 814, 820-21 (11th Cir. 1984) (Clark, J., dissenting). */

Since Judge Clark did find that the form would be used in a testimonial manner, the dissent then noted that the form's contents would be "unquestionably incriminating." By

*/This Court announced its decision in *Doe* while Ghidoni's cas was pending in the Court of Appeals. On instructions of the Court, the parties submitted supplemental argument, by letter, discussing *Doe's* impact on Ghidoni's case.

the government's own admission, the form's whole purpose would be to gather evidence against Ghidoni. As the dissent succinctly put it, the self-incrimination clause does not tolerate compelling Ghidoni to sign the form "any more than it tolerates compelling him to sign a confession." *Id.* at 821.

REASONS FOR GRANTING THE PETITION

The case presents an important and novel question concerning the Fifth Amendment privilege against compelled self-incrimination. In a case of first impression in any circuit court of appeal, the Eleventh Circuit has obliterated the fundamental rule of law that compelling a citizen to provide testimony, in furtherance of his own prosecution, is forbidden by the Constitution. Moreover, in focusing upon *how* the compelled testimony will be used against the citizen, rather than *whether* that testimony will be used at all, the court has departed from the method of analyzing self-incrimination claims that is unanimously mandated by this Court's decisions.

At the outset, Ghidoni would emphasize that this case does not involve an ordinary disclosure of bank records in the course of an income tax investigation or prosecution. Ghidoni has never contended at any stage of this case that the bank records involved here may not be disclosed by any procedure at all. The issue arises from the particular procedure used in this case, as approved by the district court and by the Eleventh Circuit. In sanctioning that procedure, the lower courts have effectively held that a defendant may be forced to supply testimony that will ultimately prove the very facts needed to convict him: that the bank acount exists, and that he controls it.

The question of government access to documents located in a foreign country, and particularly bank records, is now arising in the lower federal courts with increasing frequency. Typically, the records exist in a jurisdiction with strict secrecy laws precluding the custodian of the records from disclosing them, either voluntarily or under a foreign subpoena. With general uniformity, the courts of appeal, including the Eleventh Circuit, have now upheld the government's authority to obtain access to foreign bank records by compulsory process, provided that the requisite procedural steps are observed. *See*

Marc Rich & Co., A.G. v. United States, 707 F.2d 663 (2d Cir.), *cert. denied,* - U.S. -, 103 S. Ct. 3555 (1983); *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia),* 691 F.2d 1384 (11th Cir. 1982), *cert. denied,* - U.S. -, 103 S.Ct. 3086 (1983); *United States v. Vetco, Inc.,* 644 F.2d 1324 (9th Cir.), *cert. denied,* 454 U.S. 1098 (1981); *In re Grand Jury Proceedings (United States v. Field),* 532 F.2d 404 (5th Cir.), *cert. denied,* 429 U.S. 940 (1976); *In re Grand Jury 81-2,* 550 F.Supp. 24 (W.D. Mich. 1982); *Securities and Exchange Commission v. Banca Della Swizzera Italiana,* 92 F.R.D. 111 (S.D.N.Y. 1981). In all of these cases, however, the government has proceeded directly against the foreign custodian/owner of the records.

Despite the fact that the government now appears to have the clear authority to proceed directly against the foreign custodian in order to obtain the records, this case presents a set of facts that may well recur with alarming frequency, should the Eleventh Circuit's judgment stand. Due to the procedural requirements of obtaining process upon a foreign entity, and the considerations of international comity involved, one may expect that the government would adopt the procedure employed below as a convenient alternative in each case involving these questions.*/ In addition to its direct contravention of the principles that are firmly established by the applicable precedent, this procedure threatens to erode the self-incrimination clause to a virtual nullity.

As the majority framed the question in the court of appeals, the issue before the court was "whether signing the form is testimonial communication." 732 F.2d at 816. Respectfully, that approach mischaracterizes the issue. Properly stated, the

*/As this petition went to press, the United States and Great Britain entered into an Exchange of Letters calling for the establishment of procedures to secure documentary information that would otherwise be protected by the Cayman Islands' Confidential Relationships Law. *See New York Times,* July 27, 1984, at p. 3. This agreement essentially will allow the Attorney General to obtain such records by certifying to the Attorney-General of the Cayman Islands that the records are relevant to certain United States proceedings. The scope of the agreement, however, is expressly limited to cases involving narcotics activity; the instant case would not be affected.

issue is whether the *form itself*, which Ghidoni is compelled to sign, will have a testimonial purpose and effect. Analytically, there is no salient difference between compelling Ghidoni to execute the form and compelling him to speak the words on the form. In either case, the appropriate inquiry is whether "testimony" is generated by the compelled act. Under these circumstances, we strongly contend that it is. And since that is the case, compelling Ghidoni to sign the form offends the self-incrimination clause on the facts of this case, in which the government has acknowledged that the executed form will be used to gather evidence proving Ghidoni's control over the Cayman funds.

This Court's decisions indicate that any act of communication that goes beyond a mere truism or self-evident fact comprises "testimony" that may not be compelled. As the Court explained in *Fisher v. United States*, 425 U.S. 391 (1976), compelled handwriting exemplars are constitutionally permissible because their communicative effects are both minimal and irrelevant to their purpose:

> When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege.

Fisher v. United States, 425 U.S. 391, 411 (1976).

Applying *Fisher's* approach to the consent form at issue here, the majority below mistakenly focused upon the act of signing the form rather than on the form itself. *See* 732 F.2d at

817-18. The act of signing is not what the government will use against Ghidoni; what will be used is the form itself, which has become, through Ghidoni's compelled signature, a written version of Ghidoni's own words. For Fifth Amendment purposes, forcing Ghidoni to sign the form is indistinguishable from, for example, forcing him to accompany a government representative to the Cayman bank, and to speak the words on the form in person to a bank official. In either case, the physical act (signing the form or speaking its contents) is beside the point. What matters is the *content* of Ghidoni's words, which affirmatively tell the bank officials, "if any of the subpoenaed records exist, then you have my authority to release them."

It is this communicative aspect of the "Direction" form that distinguishes it from the non-testimonial acts that are not subject to Fifth Amendment protection, for example, the giving of a handwriting or voice exemplar. In those cases, the communication itself is wholly incidental. It does not matter what is written or said by the person furnishing the exemplar; the exemplar is merely used as an identifying characteristic, no different from one's fingerprints, or height, or hair color. As this Court observed in *Gilbert v. California,* 388 U.S. 263 (1967):

> One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication with the cover of the [self-incrimination] privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection . . . *No claim is made that the content of the exemplars was testimonial or communicative matter.*

Id. at 266-67 (citations omitted) (emphasis added). *See also*

United States v. Mara, Mara U.S. 19, 22 (1973); *United States v. Wade,* 388 U.S. 218 (1967).

The majority below considered this case to be analogous to the "act of production" cases, in which the person compelled to produce the documents contends that the very act of production would incriminate him. 732 F.2d at 819 n. 12. *See United States v. Doe,* _____ U.S. _____, 104 S.Ct. 1237 (1984); *Fisher v. United States,* 425 U.S. 391 (1976); *In re Katz,* 623 F.2d 122 (2d Cir. 1980); *Parker v. Baltimore & Ohio R. Co.,* 555 F.Supp. 1177 (D.D.C. 1983); *United States v. Karp,* 484 F.Supp. 157 (S.D.N.Y. 1980); *In re Grand Jury Subpoena Duces Tecum,* 466 F.Supp. 325 (S.D.N.Y. 1979). In those cases, it is the act of production that supplies the testimony that validates the claim of privilege. The party producing the subpoena is testifying, albeit tacitly, that the subpoenaed items exist and that he has control over them. Thus, even though the items are not intrinsically protected from disclosure, production may not be compelled because it implicitly establishes facts that could incriminate the citizen. On the appropriate facts, production equals incriminating testimony.

The testimonial element of the act of production cases is far more subtle than in this case. The testimony is apparent on the form itself - "I hereby consent" - and indeed, that testimonial content is the very purpose for compelling execution of the form. Rather than the tacit communication condemned in *Doe,* this case involves a palpable, affirmative act that is unquestionably communicative in character. To borrow a phrase from *Fisher,* the government would certainly be relying on the "truth-telling" of the form's executor. *See Fisher v. United States,* 425 U.S. at 411. Unless the bank accepted the form's assertions as true, the form would be of no use. Put another way, unless the form was construed by the bank to set forth Ghidoni's actual consent, however conditionally, then the form would have no purpose.

Under a proper analysis, this case is controlled by *Curcio v.*

United States, 354 U.S. 228 (1957). In *Curcio,* as here, the government sought documents that were not themselves privileged, since they were corporate records and therefore clearly unprotected by the Fifth Amendment. *See Wilson v. United States,* 221 U.S. U.S. 361 (1911); *Hale v. Henkel,* 201 U.S. 43 (1906). Despite the unprotected status of the documents themselves, however, the *Curcio* Court held that a witness cannot be compelled to testify about them, or to testify about their whereabouts if the witness fails to produce them. The critical question, then, does not depend upon the nature of the documents, but rather upon whether the person is required to perform some communicative act concerning those documents. If so, and if that act (or the documents themselves) might be incriminating, then the self-incrimination clause forbids compelling the act.

As *Curcio* makes clear, the validity of Ghidoni's claim has nothing to do with whether the records themselves are accessible to the government by some other means. Thus, the characterization of the majority below that Ghidoni is merely "required to waive a barrier" to production, 732 F.2d at 819 n. 12, does no more than beg the question. If Ghidoni is required to "waive the barrier" by a compelled testimonial act that would incriminate him, then the constitution has been offended.

Once it is established that compelling Ghidoni to sign the form is compelling a testimonial act, the only remaining question arises from the third criterion of the privilege: whether the compelled communication is sufficiently "incriminating" to trigger Ghidoni's Fifth Amendment rights. On these facts, Ghidoni can easily satisfy that test. The government has consistently acknowledged that it proposes to use the form to gather evidence against Ghidoni. Thus, the form itself constitutes an "incriminating" statement under the precedent.

It is well settled that the courts are to apply a liberal standard in determining whether a person's communications might be sufficiently "incriminating" to trigger the application

of the Fifth Amendment privilege. The communication need not be used directly against the accused in order to implicate the privilege. As the Court stated in the leading case of *Hoffman v. United States*, 341 U.S. 479 (1951):

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces *those which would furnish a link in the chain of evidence needed to prosecute* the [accused] for a federal crime . . .

Id. (emphasis added). Thus, even those communications that might furnish mere "investigatory leads" are protected by the privilege. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 78 (1965). If the communication would "lead to other evidence that might be . . . used" against the person, he cannot be compelled to provide it. *Kastigar v. United States*, 406 U.S. 411, 445 (1972). Since the government has admitted that it will use the form to obtain not only investigatory leads but, in all likelihood, direct evidence against Ghidoni, the "incriminating" aspect of the form is patent.

Even if this case is analogized to *Doe* and the other "act of production" cases, Ghidoni's claim of privilege is a valid one. In *Doe*, the incriminating effect of compelled production was much like the incriminating effect in this case: the government would have established existence and control of the evidence against Doe by compelling him to state (implicitly) that the subpoenaed documents existed. *See Doe*, 104 S.Ct. at 1243 nn. 11 & 12. Existence and control were incriminating facts, as they would be here. In *Doe*, the incrimination was perhaps more direct, since the form in this case is couched in conditional terms that do not directly acknowledge the actuality of any accounts or Ghidoni's control over them. But that observation cannot matter; this Court's cases unanimously teach that compelled testimonial incrimination is forbidden by the Con-

stitution no matter how indirectly that incrimination might arise. For example, in *Kastigar*, the Court upheld the constitutionality of derivative use immunity because

> [i]t prohibits the prosecutional authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Kastigar, 406 U.S. at 453 (emphasis in original). Thus, whether the evidence of control arises directly from the compelled act, as in *Doe*, or less directly, as in this case, the ultimate issue is the same: will the testimony be used to gather evidence against the citizen who is compelled to provide it? Since the government has acknowledged that its whole purpose is to prove Ghidoni's control over the funds by means of the records that it seeks, that question must be answered in the affirmative here.

The essential flaw in the Court of Appeals' analysis is that it focuses upon what the consent form would *not* say. Since, the majority wrote, the form would not admit the existence of any accounts, control over any accounts, or the authenticity of any documents produced, then the form's communicative qualities are essentially irrelevant. 732 F.2d at 817-18. Respectfully, this approach misses the mark. The proper focus is not upon *what* the direction form might or might not communicate; rather, the appropriate question is whether it communicates anything at all. Once it is established that the district court has compelled Ghidoni to communicate something beyond mere "truisms" or "self-evident" facts, *see Fisher*, 425 U.S. at 411, then the only remaining question is whether the compelled communication is incriminating to Ghidoni. And on these facts, since the government itself has acknowledged that the form would be used to obtain a link in the chain of evidence against Ghidoni, there can be no real dispute over whether the compelled communicative act is sufficiently incriminating to

trigger the self-incrimination privilege.

The danger of the Court of Appeals' analysis cannot be overstated. Consistent with *Ghidoni's* rationale, for instance, a grand jury could lawfully subpoena a putative defendant to appear before it and to give testimony that would unquestionably assist the government's case against him. As long as the government carefully frames its questions in conditional terms - "If the incriminating evidence were to exist, Mr. Witness, you must tell us where it would be and how we might obtain it" - then a district court cannot sustain a claim of privilege under *Ghidoni.* Under the *Ghidoni* rationale, the witness would not admit existence, control or authenticity due to the conditional nature of the question, and therefore he could not refuse to answer the question on Fifth Amendment grounds, no matter how incriminating his response might be. Such a result cannot be squared with the plain meaning and purpose of the self-incrimination clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 1984

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Solicitor General, and to Glenn L. Archer, Jr., Esquire, Assistant Attorney General, Michael L. Paup, Esquire, Robert E. Lindsay, Esquire, Alan Hechtkopf, Esquire, and J. Laurens Tullock, Esquire, Tax Division, Department of Justice, Washington, D.C. 20530, by federal express this 17th day of Aug., 1984.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO.: TCR 83-07016

UNITED STATES OF AMERICA

Plaintiff,

vs.

LAWRENCE L. GHIDONI,

Defendant.

ORDER

This is a criminal tax prosecution of Lawrence L. Ghidoni on charges that Mr. Ghidoni willfully and knowingly made and subscribed false United States corporation and individual income tax returns for the years 1976 and 1977. On November 9, 1983, Mr. Ghidoni and The Bank of Nova Scotia were served with trial subpoenas directing them to produce certain documents. The government then sought an order, pursuant to Rule 17(c), Federal Rules of Criminal Procedure, for early production of the documents requested by the trial subpoenas. By order dated November 17, 1983 (doc. 19), and by order dated December 5, 1983 (doc. 28), this court ordered early production of the subpoenaed documents by Mr. Ghidoni and by The Bank of Nova Scotia.The subpoena served upon The Bank of Nova Scotia calls for the production of documents located at the Cayman Islands branch of this Bank and at its trust organization, The Bank of Nova Scotia Trust Company

[Cayman] Limited. The Bank of Nova Scotia is a Canadian bank that does business in the United States, has offices located in the United States, and the subpoena was served upon the Bank's Miami, Florida office.

Mr. Ghidoni and The Bank of Nova Scotia have filed motions to quash the subpoenas requiring production of documents prior to trial. Additionally, the Government has filed a motion for an order directing Mr. Ghidoni to execute a "direction" form authorizing The Bank of Nova Scotia Trust Company (Cayman) Limited to produce records and give evidence (doc. 26).

At a hearing held on December 22, 1983, this court denied Mr. Ghidoni's motion to quash. The basis of the motion was that production of the corporate records would violate the defendant's Fifth Amendment right agaist self-incrimination. The court held there was no Fifth Amendment protection afforded to the requested corporate records, and that the subpoena issued required Mr. Ghidoni to produce records in his capacity as a representative or corporate officer. However, Mr. Ghidoni was not required to produce personal or private testimonial documents.

At the same hearing, the court heard the Government's argument in favor of its motion for an order requiring Mr. Ghidoni to execute a "direction" form authorizing the Bank to produce bank records and to give evidence. The court also heard Mr. Ghidoni's arguments that such an order would violate both his Fifth Amendment protection against self-incrimination and his Fifth Amendment due process rights. The Government seeks the execution of the "direction" in order to permit The Bank of Nova Scotia to comply with The Confidential Relationships (Preservation) Law (Law 16 of 1976, as amended by Law 26 of 1979) of the Cayman Islands.

All parties agree that bank records located in the United States must be produced if they are subpoenaed. Bank records are not protected by any constitutional privilege because such bank records are maintained by a third party, are not private

in nature, and are not testimonial in nature. *United States v. Miller,* 425 U.S. 435 (1976); *California Bankers Assn. v. Schultz,* 416 U.S. 21 (1974).

Foreign banks which do business in the United States are also required to produce bank records in response to a duly issued subpoena. In fact, the very same bank, Bank of Nova Scotia, has previously been determined to be subject to an order requiring it to turn over bank records even when those records might be in a foreign office of the bank. *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia,* 691 F.2d 1384 (11th Cir. 1982), *cert. den.,* 103 S.Ct. 3086 (1983). Also see *Mark Rich & Co., a.g. v. United States,* 707 F.2d 663 (2d Cir. 1983), *cert. den.,* 51 U.S.L.W. 3920 (June 27, 1983).

It is very important to keep in mind that the defendant has no protected right to secrecy or privacy flowing from the bank secrecy laws of the Cayman Islands. In *United States v. Payner,* 447 U.S. 737, 65 L.Ed. 2d 468 (1980), the United States Supreme Court addressed this very question and unequivocally held that foreign bank secrecy laws provide *no privacy rights for United States* citizens that are not otherwise present under the Constitution and laws of the United States, noting:

> The statute is hardly a blanket guarantee of privacy. Its application is limited; it is hedged with exceptions . . . Moreover, American depositors know that their own country requires them to report relationships with foreign financial institutions.
>
> 65 L.Ed. 2d at 474, n.4

While recognizing that this court has power to compel foreign banks to disclose records and to impose criminal fines for contempt for failure to disclose, the Bank's position is that it cannot comply with this court's subpoena without violating the Cayman Island bank secrecy law. That law subjects the Bank and its employees to criminal charges in the Cayman

Islands if information concerning bank records or accounts are released without the authoriztion or "consent" of the "relevant principal." The Confidential Relationships (Preservation) Law (Law 16 of 1976), Cayman Islands; The Confidential Relationships (Preservation) (Amendment) Law, 1979 (Law 26 of 1979), Cayman Islands. This court recognizes the dilemna facing the Bank in attempting to make its way among the conflicting laws of the United States and the Cayman Islands.

The Government argues there is a compromise position that would protect The Bank of Nova Scotia, while providing the subpoenaed records and documents. The Government urges that this court order Mr. Ghidoni to execute a "direction" form that would authorize the Bank to release the requested information and/or documents. The Cayman Islands bank secrecy law does expressly provide that the law's criminal liability has no application when the information divulged is "with the consent, express or implied, of the relevant principal." Section (3) (2) (b) (i), Confidential Relationships (Preservations) Law, as amended.

In considering the Government's motion, the court must recognize that the accused in this case has refused to voluntarily disclose or voluntarily direct the Bank to disclose any records or accounts which it may have that relate to the accused or in which the accused is a "relevant principal." The defendant contends that the order requested by the Government would violate the due process and self-incrimination clauses of the Fifth Amendment, not because the records would themselves be incriminating, but because the authoriztion must be by a relevant principal and, therefore, testimonial.

DUE PROCESS

Defendant's due process argument urges that a criminal defendant cannot be required to cooperate with the Government in his own prosecution. The court accepts this due process argument in its general application, but must recognize numerous exceptions to the general rule. Defendants have been required to submit to blood tests, *Schmerber v. California,* 384 U.S. 757 (1966), or to furnish handwriting or voice exemplars and submit to finger printing. *United States v. Dioniso,* 410 U.S. 1 (1973); *Gilbert v. California,* 388 U.S. 263 (1967). More importantly, for due process consideration, the court must recognize that in *Fisher v. United States,* 425 U.S. 391 (1976), the United States Supreme Court held that records not protected by the Fifth Amendment self-incrimination clause or some other constitutional right could be subpoenaed directly from an accused or his attorney. It is generally recognized that bank records are not protected from disclosure by any constitutional privilege. *See United States v. Miller* and *California Bankers Ass'n., supra.*

This court finds that the Government has the right to the requested documents, whether they are in the possession of the bank or of the defendant. Only foreign confidentiality laws prevent the bank from disclosing the requested documents and information pursuant to duly issued subpoenas. Requiring the defendant to execute a form directing the release of such information only frees the corporate bank officers from criminal liability under the laws of the Cayman Islands. It is not an act that violates the defendants basic due process *by requiring him to cooperate in his prosecution,* because the defendant has no right to have such information withheld. Therefore, this court holds that requiring the defendant to execute a form directing The Bank of Nova Scotia to produce, pursuant to the subpoena and direction form, whatever records the Bank may have would not violate defendant's constitutional due process rights, *so long as the direction form itself*

does not violate the defendant's privilege against self-incrimination.

SELF-INCRIMINATION

Again, it is clear that the bank records themselves, maintained by the third-party bank, are neither private nor testimonial and, therefore, not protected by the Fifth Amendment from production pursuant to a subpoena *duces tecum*. *California Bankers Ass'n.* and *United States v. Miller, supra.* However, in this instance it is not the bank records for which defendant claims a self-incrimination privilege. It is the direction form itself which defendant claims would incriminate him if he is ordered by this court to execute it.

Defendant argues that the execution of the consent form is itself a testimonial act and, further, that under the secrecy laws of the Cayman Islands, the voluntary release of such information for an account can only be accomplished by a release from a "relevant principal" of the account. Defendant contends that production of any documents pursuant to the subpoena and direction form would necessarily imply that he was, in fact, a principal in an account at The Bank of Nova Scotia, and thereby tend to incriminate him in this tax fraud proceeding.

The court has reviewed the Cayman Islands Confidential Relationships (Preservation) Law and finds that the criminal liability against bank officers does not apply when release of information is with the consent of a "relevant principal."[1] While relevant principal is not defined under the act, the word "principal" is defined as: "[a] person who has imparted to another confidential information in the course of the transaction of business of a professional nature." Section 2, Confidential Relationships (Preservation) Law. There is nothing in this

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[1]Cayman Islands Confidential Relationships (Preservation) Law does provide for application to a judge of the Grand Court of the Cayman Islands for direction whenever information under the law is to be given or is required to be given by any court. The judge may then order the evidence to be given or withheld. The use of such a time-consuming procedure would not be of practical value in a criminal prosecution, which, under the laws and public policy of the United States, must be brought to a "speedy trial."

definition that would tend to reflect a special protected category of persons.

The Fifth Amendment privilege against self-incrimination applies when an accused is compelled to make a testimonial communication. *Fisher v. United States,* 425 U.S. 391 (1976). *Fisher* recognized two situations when the act of producing evidence in response to a subpoena could have communicative aspects aside from the contents of the documents themselves. First, the production of documents could amount to an admission of their existence and control by a taxpayer. Second, the act of production might be testimonial if responding to the subpoena authenticates the documents produced. Neither of those situations apply in this case. Production of the documents (if there are documents) would be by The Bank of Nova Scotia. There is nothing communicative about the execution of the "direction" form. The accused would neither admit existence of such documents nor control by himself over such documents. Defendant will not vouch for the accuracy of any documents that may be produced. The authentication of the documents would not be by the accused, but would have to be by some authorized representative of The Bank of Nova Scotia.

This court agrees with the rationale set out in *United States v. Quigg,* 48 A.F.T.R. 2d 81-5953 (D.C.Vt., January 5, 1981). In that case, District Judge Albert Coffrin ordered the defendant, charged with evasion of federal income taxes, to consent to the disclosure of bank records held by a Bahamian branch of a Canadian bank. The Bahamas have similar bank secrecy laws as found in the instant case. Judge Coffrin, as this court, found that ordering an accused in a criminal tax prosecution to release foreign bank records violated neither the accused's due process rights nor privilege against self-incrimination. Several civil actions have also resulted in court orders requiring individuals to consent or direct release of foreign bank records protected by foreign confidentiality laws. *Trahoulsi v. Shearson Loeb Rhodes, Inc.,* Order, 80 Civ. 7088 (WK)

(S.D.N.Y. Oct. 1, 1981); *Securities & Exchange Commiss'n. v. Mussella,* Order, 83 Civ. 8342 (S.D.N.Y. Sept. 7, 1983).

Although this court has reviewed the memorandum order of Magistrate Harvey E. Schesinger found in *United States v. Ward,* No. 81-1-Cr-J-B (M.D. Fla. April 6, 1981), this court does not find Magistrate Schlesinger's reasonings to be persuasive. In *Ward,* the magistrate first refused to order an accused to execute a consent form allowing production of foreign bank records solely because the style of the form alleged a voluntary consent by the accused, finding that signing such a statement would constitute the execution *of a false oath* in violation of Florida statutory law. On reconsideration, the court additionally found that such an order would be a denial of the accused's due process rights. Such a denial of constitutionally guaranteed rights is not found by this court in this action, nor does this court find the "direction" form to be, in any way, a false oath, since it clearly sets out why it is being executed.

Accordingly it is ORDERED:

(1) The motion of The Bank of Nova Scotia to quash the subpoena served upon it (doc. 36) is hereby DENIED.

(2) The Government's motion to order the defendant to execute a direction form (doc. 26) is hereby GRANTED.

(3) The defendant shall appear at the office of the United States Attorney in Tallahassee, Florida, within (10) days from the date of this order and at that time shall execute the attached direction form.

DONE AND ORDERED this 30th day of December, 1983.

ROGER VINSON
United States District Judge

DIRECTION

I, LAWRENCE L. GHIDONI, of the State of Florida in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto, in the case of the *United States of America v. Lawrence L. Ghidoni*, Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

DATED this _____ day of _____, 1984, at Tallahassee, Florida.

_____
Lawrence L. Ghidoni

Sworn to and subscribed
before me this _____, _____
day of_____, Notary Public, State of
1984. Florida at Large

My commission expires: _____

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCR 83-07016

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAWRENCE L. GHIDONI,

Defendant.

ORDER

This cause was heard upon the court's order to show cause why defendant Lawrence Ghidoni should not be held in contempt of court for failing to comply with this court's order of December 30, 1983. That order required the defendant Ghidoni to sign a direction form allowing release of certain foreign bank accounts and records. After hearing argument of counsel, the court finds Mr. Ghidoni in civil contempt of this court based on 28 U.S.C. §1826 and this court's inherent powers and orders Mr. Ghidoni confined in the Leon County Jail, Tallahassee, Florida, to report to that jail seven days after the date of this order, until he purges himself of that contempt or files bond as hereinafter provided.

Although the court believes its order of December 30, 1983 is well founded, the court realizes the subject of the December 30, 1983 order is not a well settled area of the law and any appeal of this order holding Mr. Ghidoni in civil contempt is

not considered to be a frivolous appeal nor one taken for delay.

Defendant's pre-trial and appeal bond is hereby fixed at $50,000 to be posted according to the local rules within 7 days of the date of this order.

The trial of this action is hereby rescheduled for April 9, 1984, in Tallahassee, Florida. All other pre-trial dates shall remain in effect.

DONE AND ORDERED this 31st day of January, 1984.

ROGER VINSON
United States District Judge

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lawrence L. GHIDONI.
Defendant-Appellant.

No. 84-3101

United States Court of Appeals,
Eleventh Circuit.

May 2, 1984.

Appeal from the United States District Court for the Northern District of Florida.

Before HENDERSON, ANDERSON and CLARK, Circuit Judges.

R. LANIER ANDERSON, Circuit Judge:

In this appeal, we consider whether the defendant, Lawrence Ghidoni, can invoke the Fifth Amendment to justify his refusal to sign a consent directive that would enable the government to obtain records from a Cayman Islands bank. The district court ordered Ghidoni to execute the directive.[1] Ghidoni refused, arguing that compelled execution of the directive would violate his right against self-incrimination. The district court rejected the claim and found Ghidoni in contempt. We affirm.

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[1] The consent directive states:

I, LAWRENCE L. GHIDONI, of the State of Florida in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon

FACTS

On October 5, 1983. the grand jury for the Southern [*sic*] District of Florida returned an indictment charging Ghidoni with four counts of willful tax evasion, in violation of 26 U.S.C. § 7201. The indictment alleged that Ghidoni, as an individual and through his wholly-owned Florida corporation, had in 1976 and 1977 engaged in a scheme whereby income from building material sales to foreign purchasers was diverted to accounts with the Bank of Nova Scotia in the Cayman Islands. The allegedly diverted income was not reported on the corporation's tax returns for those years. Nor did Ghidoni report on his individual return alleged distributions from the corporation to him. Ghidoni maintains that neither he nor his corporation control any Cayman Island bank accounts and that distributions to him from accounts there were loans from foreign clients.

In furtherance of its investigation, the government issued a subpoena to the Miami, Florida, branch of the Bank of Nova Scotia, commanding production of bank records relating to Ghidoni's accounts. In negotiations with the government, bank officials expressed concern that production of these records would subject bank employees to criminal liability under the Confidential Relationships (Preservation) Law of the Cayman

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which I am authorized to draw, specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto, in the case of the *United States of America v. Lawrence L. Ghidoni*, Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

Islands.[2] The bank suggested that problems with the Cayman Island law could be avoided if Ghidoni would execute a directive consenting to disclosure. Accordingly, the government obtained the district court order compelling Ghidoni to sign the directive, and Ghidoni's refusal to do so led to the finding of contempt now on appeal.

DISCUSSION

The Fifth Amendment provides individuals with a privilege against self-incrimination. A violation of that privilege occurs when "the accused is compelled to make a testimonial communication that is incriminating." *Fisher v. United States,* 425 U.S. 391, 408, 96 S.Ct. 1569, 1579, 48 L.Ed.2d 39 (1976). *See United States v. Authement,* 607 F.2d 1129, 1131 (5th Cir.1979)[3] (articulating the three factor test of (1) compulsion, (2) testimonial communication, and (3) incrimination). The district court order in the instant case obviously compels the defendant to sign the consent directive; the only issue we consider is whether signing the form is testimonial communication.

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[2] Confidential Relationships (Preservation) Law (Law 16 of 1976), as amended (Law 26 of 1979) states in § 4 that:

> (1) Subject to the provisions of sub-section (2) of section 3, whoever -
> (a) being in possession of confidential information however obtained;
> (i) divulges it; or
> (ii) attempts, offers or threatens to divulge it to any person not entitled to possession thereof;
>
> * * *
>
> is guilty of an offense [sic] and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 2 years or both.

Section 3, however, states:

> (2) This Law has no application to the seeking, divulging, or obtaining, of confidential information -
> (a) in compliance with the directions of the Grand Court pursuant to section 3A;
> (b) by or to -
> (i) any professional person acting in the normal course of business *or with the consent, express or implied, of the relevant principal;*

(emphasis added).

[3] In *Bonner v. City of Pritchard,* 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

Because we hold that Ghidoni makes no testimonial communication in signing the form, we need not address the incrimination intent.[4]

At the outset, we emphasize that Ghidoni has not asserted, nor could he argue, that the contents of the bank records are eligible for protection under the Fifth Amendment. It is well-established the bank records are not protected from disclosure by any constitutional privilege. *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55, 94 S.Ct. 1494, 1514, 39 L.Ed.2d 812 (1974)("a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights").[5] Rather, Ghidoni's assertion of privilege centers on the alleged testimonial and incriminating aspects of his compelled signing of the directive.

In this vein, the Supreme Court has recognized that a Fifth Amendment privilege can, under the proper facts, attach to the mere act of producing certain documents.

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with this subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those

[4] The dissent asserts that the consent directive "is unquestionably incriminating, in that it furnishes a link in the chain leading to the procurement of documents that the government intends to use to secure Ghidoni's conviction." *Infra* slip op. at 3232 at —. We do not necessarily disagree, but because we find no incriminating *testimony* in the contents of the directive or the fact that Ghidoni must sign, we need not address the incrimination element.

[5] The United States courts have the power to obtain the records held by a foreign branch of any bank doing business in the United States, *see In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, 691 F.2d 1384, 1388-89 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983), and "foreign bank secrecy laws provide no privacy rights for U.S. citizens that are not otherwise present under the Constitution and laws of the United States." *United States v. Payner*, 447 U.S. 727, 732 n. 4, 100 S.Ct. 2439, 2444 n. 4, 65 L.Ed.2d 468 (1980).

> described in the subpoena . . . . The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and the circumstances of particular cases or classes thereof.

Fisher v. United States, 425 U.S. at 411, 96 S.Ct. at 1581 (citations omitted). *See United States v. Miller*, 660 F.2d 563, 566 (5th Cir.1981)(Unit B)[6] (discussing *Fisher* and noting that the testimonial aspects of production have three facets - testimony with respect to existence, possession or control, and authentication), *vacated as moot*, 685 F.2d 123 (5th Cir.1982)(Unit B).

In *Fisher*, the Court recognized that in some situations the act of producing business records prepared by an accountant could have the above-mentioned testimonial implications, but held that the Fifth Amendment was not violated by a production of those records in a case in which the existence of the records and the defendant's possession or control were a "foregone conclusion." *Id.* at 411, 96 S.Ct. at 1581. The government was not relying on the "truthtelling" of the taxpayer, or any "testimony" involved in the act of production, to prove the existence of the records or the taxpayer's access to them. *Id.* Furthermore, the Court held that the Fifth Amendment was not involved because authentication of the records produced was to be made by the accountant and not the defendant. *Id.* at 413, 96 S.Ct. at 1582.

The facts in *United States v. Doe*, — U.S. —, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) led to a contrary holding on the testimonial aspects of production. In *Doe*, the Court deferred to a district court finding that a sole proprietor's compelled pro-

[6] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34.

duction of business records under subpoena would attest to the existence, possession or control, and authenticity thereof. The Court in *Doe* thus held that even though the contents of the records were not privileged, the act of production could not be compelled under the Fifth Amendment.

In the instant case, Ghidoni argues that signing the directive would have testimonial aspects, *i.e.*, would be an implicit assertion that the Cayman Island bank accounts existed, were authentic, and that he controlled them. He further argues that these three elements are currently in dispute, and therefore that his compelled signing would be testimony attesting to these elements and would form an incriminating link assisting the government in meeting its burden of proof.[7]

The district court, in holding Ghidoni in contempt, found the consent directive in the instant case devoid of any testimonial aspects. We agree.

Although the existence of the bank accounts may be in dispute, nothing in the directive implies that such accounts exist. Rather, the directive states that *if* the accounts exist, the bank is permitted to disclose records of those accounts to the government. *See supra* note 1. As in *Fisher,* the government here is in no way relying upon the "truthtelling" of the taxpayer's directive to show the existence of the accounts. 425 U.S. at 411. 96 S.Ct. at 1581. We conclude that the directive contains no implicit testimony that the records do in fact exist.

The second element, possession or control, also is in dispute. Again, the directive makes no explicit statement regarding Ghidoni's control of the accounts. Rather, the directive merely

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[7] Ghidoni also argues that his signing the consent directive would constitute a due process violation by forcing him to make a false communication. He asserts that his signature, evincing consent to the bank's disclosure, would be a sworn misstatement because he does not consent to disclosure. *See United States v. Ward,* No. 81-1-CR-J-B (M.D.Fla. April 6, 1981) (memorandum opinion denying motion to execute forms). Ghidoni's argument borders on frivolous. The consent directive is perfectly clear in stating that Ghidoni is signing under the compulsion of the court order. *See supra* note 1. With the grounds for his "consent" so stated, we hold that the directive does not compel a misstatement and does not create a due process violation.

permits the bank to disclose information relating to any accounts with respect to which the *bank records* indicate Ghidoni's authority to draw (*i.e.*, any accounts with respect to which the bank *thinks* Ghidoni has authority). Ghidoni has denied control over any accounts with the bank and the directive does not contradict this testimonial assertion.[8] We conclude that the directive contains no implicit testimony with respect to control.

Because the directive contains no statement by Ghidoni on either control or existence of the accounts, the directive could not be used by the government as an admission thereof.[9]

Finally, Ghidoni argues that the directive would tend to authenticate any documents obtained from the bank. In this regard, this case is indistinguishable from *Fisher,* where the government was seeking records prepared by an accountant for the defendant. Because the taxpayer could not authenticate the accountant's work papers or reports by oral testimony, the Court held that the taxpayer's production of those accounts would not assist in authentication. 425 U.S. at 413, 96 S.Ct. at 1582. Similarly, only the bank could authenticate the records at issue here. *Compare United States v. Doe,* — U.S. at —, & n. 15, 104 S.Ct. at 1244 & n. 15 (mere production by sole proprietor, who prepared records himself, would authenticate records).

In affirming the district court's finding that the instant directive is not testimonial or incriminating, we are further persuaded by distinctions between this case and *Doe.* The subpoena duces tecum in *Doe* required the taxpayer, a sole proprietor, to produce certain records in his possession or control, thereby

[8] In other words, we read the directive as equivalent to a statement by Ghidoni that, although he expresses no opinion with regard to the existence of or his control over any such accounts, he is authorizing the bank to disclose information relating to accounts which, in the bank's opinion (or with respect to which the bank records indicate), Ghidoni controls.

[9] In concluding that the government could not use the directive, we are not affording Ghidoni any "constructive immunity" regarding subsequent use of the directive. The Supreme Court opinion in *Doe* makes clear that the judiciary cannot afford subsequent "use" immunity in the absence of a formal request by the Department of Justice under 18 U.S.C. §§ 6002 and 6003. — U.S. at — & n. 16, 104 S.Ct. at 1244 & n. 16. Rather, we simply hold that the directive in the instant case lacks any probative testimonial value on the issue of control or existence.

establishing existence, possession or control, and authenticity, and removing the taxpayer's ability to present arguments to the contrary. Conversely, Ghidoni has to produce only a directive, which contains no testimony regarding the existence of bank accounts or his control of them. The account records, if they exist, are held by the bank and any testimony on the existence, control, or authentication elements of the records would have to come from the records themselves and the bank officials. After executing the directive, Ghidoni can still maintain that the records do not exist, that he does not control them, and that they are not authentic.[10] These factors demonstrate the nontestimonial nature of the consent directive.[11]

We find further support for our holding in several cases in which a defendant has been compelled to perform acts against his will. The Supreme Court, finding no Fifth Amendment violation, has upheld the compulsion. *See Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)(compelled consent to give handwriting exemplar): *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)(voice exemplar).[12]

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[10] His position on these issues would likely run up against the clear existence of the records and the probable bank testimony that Ghidoni controlled the accounts and the records were authentic. Nevertheless, no testimonial statement in the directive contradicts his current position regarding the accounts.

[11] This case is also distinguished from *Doe* on the basis of the underlying district court finding. In *Doe*, the district court had concluded as a factual matter that the sole proprietor's compelled production of records was testimonial and incriminating. The Supreme Court, without expressing it own view on these issues, deferred to the lower court finding, which had been affirmed by the court of appeals. — U.S. at — & n. 11, 104 S.Ct. at 1243 & n. 11. Conversely, the district court in the instant case found than the directive was not testimonial.

[12] We disagree with the dissent's suggestion that this case is more like the handwriting exemplar cases than the act of production cases. The handwriting cases do provide significant support for our holding in that they approve a compelled consent to provide, for example, a handwriting exemplar. However, we also see an even closer analogy between those cases in which a person is required to consent to produce documents himself, and the instant case in which Ghidoni is required to waive a barrier to permit the bank to produce documents. The issue is whether the act compelled is testimonial. For the reasons set forth, we have concluded that the compelled act in this case provides no testimony with respect to the existence, possession or control, or authentication of the documents.

In summary, we conclude that compelling Ghidoni to sign the directive would not violate Ghidoni's Fifth Amendment privilege against self-incrimination. The directive is not testimonial in nature. Accordingly, the district court contempt order is

AFFIRMED.

CLARK, Circuit Judge, dissenting:

The fifth amendment condemns compelled, incriminating testimony. The majority opinion permits what is therein condemned. When the government orders an individual to produce incriminating documents in his possession, testimony may be divulged from two different sources: first, the act of producing the documents may testify as to their existence and authenticity; second, the documents themselves are unquestionably communicative and as such are testimonial. *Fisher* and *Doe*, however, teach that while the documents themselves may be testimonial, they are not entitled to fifth amendment protection to the extent they were prepared voluntarily and thus were not compelled. Consequently under the factual circumstances of those cases, the exclusive focus of a court's concern in addressing the self-incrimination aspects of an order to produce documents must be on the act of producing those documents.

In contrast, when a suspect is ordered to sign a confession or to furnish a handwriting exemplar, the focus shifts away from the act of producing the writing and toward its contents. The act of signing a confession or providing a handwriting sample does no more than communicate the truism that the author can write and that what he has provided in his handwriting. *Fisher v. United States*, 425 U.S. 391, 411, 96 S.Ct. 1569, 1581, 48 L.Ed.2d 39, 56 (1976). It is the communicative value of what is written above his signature that is important. Thus, coercing a suspect to evince his guilt by signing his name to the statement "I confess," compels incriminating testimony and is therefore forbidden.

On the other hand, compelling a handwriting exemplar is generally permissable, insofar as the writing produced is nothing more than a non-testimonial, physical means of identification, like a fingerprint or voice sample. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (voice exemplar). Put another way, voice and handwriting samples are demonstrative rather than testimonial evidence; a suspect may even be compelled to say or write words or phrases that have independent communicative value, if it is the physical characteristics of the handwriting or voice that are sought and not the meaning of the words spoken or written. *Matter of Grand Jury Proceedings*, 579 F.2d 1135 (9th Cir.1978). The Supreme Court has made it clear that if the writing is sought not only for its physical characteristics but also for its content, the fifth amendment prohibits its compulsion:

> [T]he Government's petition for the order to compel production stated: "Such exemplars will be used solely as a standard of comparison in order to determine whether the witness is the author of certain writings." If the Government should seek more than the physical characteristics of the witness' handwriting - if, for example, it should seek to obtain written answers to incriminating questions or a signatures on an incriminating statement — then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination.

United States v. Mara, 410 U.S. 19, 22, 93 S.Ct. 774, 776, 35 L.Ed.2d 99, 103 (1973).[1]

In this case, Ghidoni is not being ordered to produce documents but to sign his name, which presents a situation closer on its facts to *Gilbert* and *Mara*, the exemplar cases, than

[1] For example, in *Schmerber v. California*, 384 U.S. 757, 763-64, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908, 915 (1966), the Court said: "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take . . ."

to the production of documents cases, *Fisher* and *Doe*. Ghidoni is being ordered to sign a statement authorizing any foreign bank with which he has an account to release his records to the government upon demand, records which the government could not obtain without his "consent." The act of signing the consent form, as with a handwriting exemplar, provides the government with no more than the truism that Ghidoni can write, and that what he has furnished is his signature. On the other hand, unlike a handwriting exemplar, the contents of the "consent" form are a communication that may produce testimony that will be incriminating.

The government is seeking "more than the physical characteristics of the witness' handwriting." *Mara*, 410 U.S. at 22, 93 S.Ct. at 776, 35 L.Ed.2d at 103. Rather, it is seeking to "obtain . . . a signature on an incriminating document." *Id.* As the consent form is worded, Ghidoni does not concede that any foreign account exists, or that any records a foreign bank may have are genuine. But that is beside the point. Ghidoni is not being asked to produce bank records, and so the testimonial aspects attendant to compelling the act of producing such records, articulated in *Doe*, are irrelevant here. We are concerned not with the act of producing records or the act of signing a consent form, but with the substance of the consent form itself, which communicates to all banks presented with the form: "I consent to have you release any account information you deem applicable to me."

Such a statement, obtained under the circumstances presented here, constitutes compelled testimony. That testimony is unquestionably incriminating, in that it furnishes a link in a chain leading to procurement of the documents that the government intends to use to secure Ghidoni's conviction. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 815, 818, 95 L.Ed. 1118, 1124 (1951). I do not believe that the fifth amendment tolerates compelling a criminal suspect to sign an incriminating consent form any more than it tolerates compelling him to sign a confession. I therefore dissent.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-3101

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LAWRENCE L. GHIDONI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

* * *

Before HENDERSON, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

(**X**) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Cir-

cuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/ R. Lanier Anderson /
United States Circuit Judge

[FILED: June 8, 1984]

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE L. GHIDONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BANK OF NOVA SCOTIA IN SUPPORT OF AFFIRMANCE

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August 31, 1984

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NO. 84-270

IN THE

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LAWRENCE L. GHIDONI,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BANK OF NOVA SCOTIA

INTRODUCTION

The Bank of Nova Scotia ("the Bank") respectfully submits this brief as *amicus curiae* in connection with the Court's consideration of the petition of Lawrence L. Ghidoni for a writ of certiorari.[1] The Bank submits that the writ of certiorari should be denied.

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1 Both petitioner and respondent have consented to the appearance of the Bank as an *amicus*, and written consents are on file with the Clerk. The Bank previously appeared as an *amicus* in this matter, supporting the United States before the United States Court of Appeals for the Eleventh Circuit.

Facts

The Bank's Miami agency was served by the United States with a trial subpoena issued by the U.S. District Court for the Northern District of Florida, which called for the production of certain records "maintained by the Bank of Nova Scotia at any of its main or branch offices in the Cayman Islands . . ." relating to several named persons and entities, including petitioner. However, production of such documents from the Cayman Islands in response to the subpoena, absent compliance with the Cayman Confidential Relationships (Preservation) Law, would expose the Bank and its officers to criminal penalties, including imprisonment and fines. Such production would be authorized under the Cayman statute if the "consent, express or implied, of the relevant principal" is obtained. Confidential Relationships (Preservation) Law, *as amended*, at § 3(2)(b)(i).

To avoid requiring the Bank to violate the Cayman criminal law in the course of complying with the subpoena, the United States made a motion before the district court for an order requiring the petitioner to execute an appropriate "direction" to the Bank authorizing disclosure. That motion was granted. However, the petitioner refused to execute the document, and was held in contempt by the district court. The defendant appealed the contempt order to the Eleventh Circuit, which affirmed the district court order on May 2, 1984. After his suggestion for rehearing en banc was denied on June 8, 1984, petitioner filed a petition for a writ of certiorari.

The Bank's Interest

The Bank's interest in this matter is two-fold. First, the proceedings below were precipitated by the service of a trial subpoena on the Bank's Miami agency, calling for the production of documents located in the Cayman Islands. Consequently, the disposition of this matter will have an immediate and significant impact on the Bank with respect to its response to the subpoena and the collateral consequences that may result in the Cayman Islands.

Second, the Bank, a large multinational financial institution with more than 1,200 offices in over 46 countries around the globe, is a frequent recipient of grand jury subpoenas, trial subpoenas, IRS summonses, and similar process in the United States, many of which call for the production in one jurisdiction of documents located in another.[2] Many of the world's significant banking and commercial centers, including Switzerland, the Bahamas, the Cayman Islands, Singapore and others, have financial privacy statutes, backed by criminal sanctions. Accordingly, the Bank has a great interest in identifying every means by which it can promptly comply with U.S. subpoenas without violation of applicable foreign criminal laws. This case involves one approach to resolving the dangerous jurisdictional dilemma presented when the mandates of different nations conflict.

ARGUMENT

THE DECISIONS OF THE DISTRICT COURT AND THE ELEVENTH CIRCUIT ARE IN HARMONY WITH THE DECISIONS OF THIS AND OTHER COURTS

In ordering petitioner to execute the direction authorizing the Bank to disclose the subpoenaed documents, both the Eleventh Circuit and the district court clearly recognized the conflicting legal obligations the Bank faced. More importantly, both courts recognized the inequity of placing on the Bank, a disinterested and neutral non-party, the burden of resolving those conflicting obligations. Instead, the burden was placed on the defendant-petitioner, where it reasonably belongs.

---

2 The Bank has today filed a petition for a writ of certiorari in a case which arose from the service of a grand jury subpoena in Miami for documents from the Bahamas, the Cayman Islands and Antigua. *In re Grand Jury Proceedings. Bank of Nova Scotia v. United States*, Nos. 83-5708, 84-5198 (11th Cir. Aug. 14, 1984), *cert. pet. filed*, No. 84-____ (U.S. Aug. 31, 1984).

After all, bank records in the United States are not protected from disclosure by any Constitutional or statutory privilege, and this Court has declared that a bank customer can have no reasonable expectation of privacy in bank records. *United States v. Miller*, 425 U.S. 435 (1976); *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974). The Court has explained that bank records are not a defendant's "private papers" but, rather are the business records of the bank, which contain only information voluntarily conveyed to the bank and exposed to bank employees in the ordinary course of business. *See United States v. Miller, supra*, 425 U.S. at 440-442. It is clear that if the records at issue in the present case were maintained in an office of the Bank located within the United States, they would be subject to production. Furthermore, as the district court explained, "It is very important to keep in mind . . . that foreign bank secrecy laws provide no privacy rights for United States citizens that are not otherwise present under the Constitution and laws of the United States." *United States v. Ghidoni*, TCR 83-07016, slip op. at 4 (N.D. Fla. Dec. 30, 1983), *citing United States v. Payner*, 447 U.S. 727 (1980).

The procedure approved by the Eleventh Circuit and the district court in this case simply provides access to documents of the type that are routinely available to federal prosecutors. The same procedure has regularly been applied by other courts facing the same dilemma.[3] Further, the approach is quick, efficient, inexpensive, and places little burden on the courts or the parties.[4]

---

3 *See U.S. v. Davis*, 83 Cr. 551 (WCC) (S.D.N.Y. June 14, 1984); *U.S. v. Quigg*, 48 A.F.T.R.2d 5953 (D.Vt. January 5, 1981); *U.S. v. Dial*, No. 83 Cr. 271 (N.D. Ill. July 28, 1983); *In re Grand Jury Investigation 82-1691* (N.D. Ill. December 15, 1983); *see also SEC v. Mussella*, 83 Civ. 8342 (CSH) (S.D.N.Y. Sept. 7, 1983) (SEC enforcement action); *Traboulsi v. Shearson Loeb Rhodes, Inc.*, 80 Civ. 7088 (WK) (S.D.N.Y. Oct. 1, 1981).

4 Recently, a justice of the Grand Court of the Cayman Islands, following a hearing in chambers, issued a judgment that a consent directive of the type adopted by the district court in this case "does not amount to consent as contemplated by section 3(2)(b)(i)" because it is signed under compulsion. *In the Matter of an Application by ABC*

(footnote continued)

While petitioner argues that a writ of certiorari should be granted because the case raises an important and novel question concerning the privilege against self-incrimination, this Court has already provided the lower courts with abundant guidance as to the proper application of the privilege in cases raising the issues presented here. *See, e.g., United States v. Doe*, ____ U.S. ____, 52 U.S.L.W. 4296 (February 28, 1984); *United States v. Miller, supra*; *California Bankers Ass'n v. Shultz, supra*; *Fisher v. United States*, 425 U.S. 391 (1976).

It is clear from those cases that the district court's order raises no meaningful Constitutional issue. The Court has noted that "it is . . . clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher v. United States, supra*, 425 U.S. at 408 (emphasis in original). The Court has explained that "the distinction which has emerged . . . is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber v. California*, 384 U.S. 757, 764 (1966); *Fisher v. United States, supra*.

The execution of the direction required by the Eleventh Circuit's decision is not testimonial in nature, and therefore cannot fall within the proscription of the self-incrimination privilege. By signing the direction petitioner is communicating nothing about the bank records themselves, and remains free to deny their existence and authenticity, as well as his control over them. The direction is intended only to lift the bar of Cayman criminal law which now prevents the Bank from producing documents that are the Bank's, not petitioner's. Whether, as a matter of Cayman law, the direction is effective to lift that bar is not properly an issue in this proceeding.

Ltd. Under the Confidential Relationships (Preservation) (Amendment) Law 1979, Cause No. 269 of 1984 (Grand Court of the Cayman Islands July 24, 1984). The Bank was not involved in any manner in that application.

CONCLUSION

Because the Bank is a major financial intermediary, it regularly receives process calling for the cross-border production of documents. In such circumstances, the Bank, as a neutral non-party, has no interest whatsoever in the underlying dispute. The Bank's only interest is to obey the applicable laws of each and every jurisdiction in which it is present. The Bank is committed to taking every reasonable step to produce subpoenaed documents, short of the commission of a crime. The procedure adopted by the district court in this case, and affirmed by the Eleventh Circuit, achieves a fair and equitable result, in which the requirements of judicial administration in the United States may be satisfied promptly and efficiently, without coercing a neutral intermediary to break the criminal law of friendly foreign sovereigns.

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August 31, 1984

Respectfully submitted,

/s/ Henry Harfield

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CERTIFICATE OF SERVICE

I, Henry Weisburg, a member of the Bar of this Court, certify that three copies of the annexed Brief *Amicus Curiae* of the Bank of Nova Scotia have been served this ____ day of August, 1984, by mail, postage prepaid, upon the following counsel:

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No. 84-270 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE L. GHIDONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, consistently with the Fifth Amendment privilege against compelled self-incrimination, a defendant in a criminal trial may be ordered to sign a form authorizing a bank at which he may have an account to produce subpoenaed bank records, where the records are located in an office of the bank in a country whose bank secrecy law prohibits disclosure of bank records without the consent of the bank's customer and the authorization form does not admit the existence of the records, the defendant's control over the records, or the authenticity of the records.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-270

LAWRENCE L. GHIDONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B11) is reported at 732 F.2d 814. The orders of the district court (Pet. App. A1-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1984. A petition for rehearing was denied on June 8, 1984 (Pet. App. B12-B13). The petition for a writ of certiorari was filed on August 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of the court of appeals' decision affirming an order of the United States District Court for the Northern District of Florida holding petitioner in civil contempt for failing to comply with a prior order of the

district court requiring petitioner to sign a form allowing the Bank of Nova Scotia to produce certain Cayman Islands bank records, production of which might otherwise violate the bank secrecy law of the Cayman Islands.

1. Petitioner was indicted on October 5, 1983, on four counts of willfully and knowingly making false income tax returns, in violation of 26 U.S.C. 7206(1) (C.A. App. 1).[1] During 1976 and 1977, petitioner was president of a Florida corporation that sold building materials to a Middle East trading group (Pet. 5). The government alleged in the district court that a large portion of the profits of the corporation during 1976 and 1977 was diverted to a bank account established and controlled by petitioner at the Bank of Nova Scotia, George Town, Cayman Islands (C.A. App. 3, at 2). The government also alleged that income diverted to the bank account in the Cayman Islands was not reported on the corporate tax returns of petitioner's corporation for 1976 and 1977 and that income distributed from the corporation to petitioner's personal control was not reported on his personal income tax returns for 1976 and 1977 (*ibid.*).

2. On November 9, 1983, a trial subpoena was served on the Miami, Florida, office of the Bank of Nova Scotia, commanding the bank to produce at trial the Cayman Islands bank records of "Bank of Nova Scotia Trust Co., Sub. Acct. 1359" for the years 1976 and 1977 and any other bank records (1976 and later) of "Lawrence L. Ghidoni (individually), Lawrence L. Ghidoni and/or Joycelyn B. Ghidoni (jointly), or Clarendon, Limited (a Cayman Island corporation)" (C.A. App. 4, App. A).

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[1]The numbers following references to the joint appendix filed in the court of appeals indicate document numbers, because the joint appendix is not consecutively paginated.

In a letter dated November 21, 1983 (C.A. App. 4, App. B), counsel for the Bank of Nova Scotia indicated that the bank's compliance with the subpoena could violate the Confidential Relationships (Preservation) Law of the Cayman Islands (C.A. App. 4, App. B.1), which, he stated, prohibits the bank from disclosing bank customer information contrary to its provisions and prescribes criminal sanctions for violations. The bank's counsel further stated that the bank's license to conduct business in the Cayman Islands was conditioned upon the bank's continued compliance with that country's banking laws, including the bank secrecy law. The bank's counsel also stated that under the banking law, a customer may waive the protection of the law and consent to disclosure. Counsel went on to suggest that a waiver of the Cayman Islands' bank secrecy law ordered by the district court would be the best approach to follow to obtain the subpoenaed records. Counsel provided a form that the bank would honor if it were executed by petitioner (C.A. App. 4, App. C).

On December 30, 1983, the district court ordered petitioner to execute, within ten days, a "direction" form similar to the one proposed by the bank's counsel. The form provided as follows (Pet. App. A10):

> **DIRECTION**
>
> I, LAWRENCE L. GHIDONI, of the State of Florida in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice,

> and to give evidence relevant thereto, in the case of the *United States of America* v. *Lawrence L. Ghidoni,* Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

In its December 30, 1983, order compelling petitioner to execute the direction form, the district court rejected, inter alia, petitioner's contention that such an order would violate petitioner's Fifth Amendment privilege against self-incrimination. Relying on *Fisher* v. *United States,* 425 U.S. 391 (1976), the court concluded that petitioner was not being asked to make any testimonial communication. The court reasoned (Pet. App. A8):

> Production of the documents (if there are documents) would be by The Bank of Nova Scotia. There is nothing communicative about the execution of the "direction" form. The accused would neither admit existence of such documents nor control by himself over such documents. Defendant will not vouch for the accuracy of any documents that may be produced. The authentication of the documents would not be by the accused, but would have to be by some authorized representative of The Bank of Nova Scotia.

By letter dated January 10, 1984, petitioner, through his attorney, refused to execute the form (C.A. App. 8). Based on that refusal, the district court ordered petitioner to show

cause why he should not be held in contempt of court (C.A. App. 10). Following a show cause hearing, the district court issued an order holding petitioner in civil contempt and ordering him into confinement, the confinement to commence seven days after the date of the civil contempt order (Pet. App. A11). Petitioner was to remain in confinement until such time as he purged himself of the contempt (*ibid.*). The district court stayed the confinement order pending appeal, however, subject to petitioner's posting of a $50,000 appeal bond (*id.* at A12).[2]

3. The court of appeals affirmed the contempt order, one judge dissenting (Pet. App. B1-B11). The court agreed with the district court's determination that the direction form was devoid of any testimonial aspects, noting that nothing in the form acknowledges that any bank accounts exist, that petitioner exercises control over any accounts that may exist, or that petitioner is able to authenticate any records that might be produced by the bank (*id.* at B6-B7). These factors, the court concluded, distinguished this case from *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 7-8, in which the Court accepted the finding of the lower courts that requiring the sole proprietor of a business to produce certain records would compel the respondent in that case to admit that the records existed, that they were in his possession, and that they were authentic.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals; indeed, petitioner concedes (Pet. 10) that this is a case of first impression in the courts of appeals. Accordingly, further review is not warranted.

1. As the courts below determined (Pet. App. A3, B4 n.5) and petitioner acknowledges (Pet. 10-11), the district court could have ordered the Bank of Nova Scotia to produce the

---

[2]The district court has extended the stay of its confinement order pending disposition of this petition (Pet. 6-7).

records subpoenaed by the government.[3] But the court recognized that such an order would have presented the bank with the dilemma of having to choose between possibly violating the bank secrecy law of the Cayman Islands and violating an order of a United States court (Pet. App. A3-A4). The order requiring petitioner to sign a direction form was an attempt by the court to reach a reasonable compromise that satisfied the government's need to obtain the records while adequately respecting petitioner's rights and protecting the Bank of Nova Scotia from potential liability in the Cayman Islands.

Contrary to petitioner's argument, the order does not offend the Fifth Amendment. The privilege against self-incrimination "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher* v. *United States,* 425 U.S. 391, 408 (1976)

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[3]The district court noted several considerations that make it abundantly clear that the government is entitled to the subpoenaed bank records. First, bank records are not protected from disclosure by any constitutional privilege, because the records are (1) maintained by third parties, (2) not private; and (3) not testimonial in nature. See *United States* v. *Miller,* 425 U.S. 435 (1976); *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21 (1974). In addition, a district court has the power to order a bank that does business in the United States to turn over records held by a branch of the same bank in a foreign jurisdiction. See *Marc Rich & Co., A.G.* v. *United States,* 707 F.2d 663 (2d Cir. 1983), cert. denied, No. 82-2011 (June 27, 1983); *In re Grand Jury Proceedings (Bank of Nova Scotia),* 691 F.2d 1384 (11th Cir. 1982), cert. denied, No. 82-1531 (June 13, 1983); *United States* v. *Vetco, Inc.,* 644 F.2d 1324, 1330 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Mannington Mills, Inc.* v. *Congoleum Corp.,* 595 F.2d 1287, 1297 (3d Cir. 1979); *In re Grand Jury Proceedings (Field),* 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *In re Grand Jury 81-2,* 550 F. Supp. 24 (W.D. Mich. 1982); *SEC* v. *Banca Della Svizzera Italiana,* 92 F.R.D. 111, 116 (S.D.N.Y. 1981). Finally, as the district court noted, this Court has "unequivocally held that foreign bank secrecy laws provide *no privacy rights for United States* citizens that are not otherwise present under the Constitution and laws of the United States." Pet. App. A3 (citing *United States* v. *Payner,* 447 U.S. 727, 732 n.4 (1980)).

(emphasis in original). See also *Andresen* v. *Maryland*, 427 U.S. 463, 473-475 (1976); *Schmerber* v. *California*, 384 U.S. 757, 763-764 (1966). Accordingly, while "the [Fifth Amendment] privilege is a bar against compelling 'communications' or 'testimony,' * * * compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber*, 384 U.S. at 764. Thus, this Court has held that the protection of the Fifth Amendment does not extend to the giving of blood samples (*Schmerber*), the giving of handwriting exemplars (*Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); see also *United States* v. *Euge*, 444 U.S. 707 (1980)), the giving of voice exemplars (*United States* v. *Wade*, 388 U.S. 218, 222-223 (1967)), or the donning of clothing worn by the perpetrator of a crime (*Holt* v. *United States*, 218 U.S. 245 (1910)).

This Court's reasoning in *Fisher*, 425 U.S. at 409-414, compels the conclusion that the direction form petitioner was ordered to sign is neither testimonial nor incriminating in any sense required to implicate the Fifth Amendment. As the district court determined (Pet. App. A8), and the court of appeals agreed (Pet. App. B6-B8), production of any records would be by the bank, not petitioner, and execution of the direction form would not be communicative because petitioner, in signing the form, would not admit either the existence of the bank records sought or control over such documents and would not vouch for the accuracy of any documents that might be produced. Moreover, authentication of the subpoenaed documents would be by some authorized representative of the bank, not petitioner. As the court of appeals noted (*id.* at B6), even after executing the direction form, petitioner would remain free to contend that the records do not exist, that he does not control them,

and that they are not authentic.[4] The direction form does no more than require petitioner to remove an obstacle to the bank's production of records it might have — records which petitioner concedes (Pet. 10) he has no right to keep from the government. The order here is in fact little different from a command that a homeowner open his doors to officers armed with a search warrant, an action that does not implicate the Fifth Amendment privilege. Cf. *Andresen* v. *Maryland, supra.*

2. Assuming arguendo that execution of the direction form would be testimonial, petitioner's claim of privilege nevertheless fails because the "testimony" would not entail self-incrimination. The government seeks bank records in this case. Any implicit admission by petitioner that those records exist or that they are his would be entirely incidental to the incrimination, if any, that would flow from information the bank would provide. The government would never have occasion to use the act of signing the direction form or the content of the form as evidence against petitioner. Petitioner is not even competent to authenticate records that are not his. And while an argument might be made that the

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[4]Petitioner erroneously asserts (Pet. 11-13) that the court of appeals "mistakenly focused upon the act of signing the form rather than on the form itself." It is abundantly clear from a reading of the court's opinion that the court carefully considered the content of the form, not merely the act of signing the form. For example, the court stated that "the directive contains no implicit testimony that the records do in fact exist" (Pet. App. B6), "the directive makes no explicit statement regarding Ghidoni's control of the accounts" (*ibid.*), and "the directive contains no implicit testimony with respect to control" (*id.* at B7).

To the extent that petitioner claims that something about the content of the direction form is in fact testimonial and incriminating, the issue is essentially fact-bound. See *United States* v. *Doe,* No. 82-786 (Feb. 28, 1984), slip op. 8. This Court has traditionally been "reluctant to disturb findings of fact in which two courts below have concurred" (*ibid.*). Accordingly, the findings of the courts below must be upheld unless they have no support in the record. *Ibid.*

bank's disclosure of records in response to petitioner's execution of a waiver of bank secrecy rights is probative of the fact that the records pertain to him, a finding in that regard would still depend entirely on the bank's credibility, since the bank would still be the entity stating the point. Moreover, evidence that petitioner had waived his rights under the bank secrecy law would add little, if anything, to the bank's statement. Thus, there is no realistic possibility here that petitioner would be incriminated by his act of authorizing the bank to disclose records, as distinct from the bank's act of disclosing pursuant to the subpoena that was issued to it. In the absence of a real and substantial threat of self-incrimination, petitioner cannot claim a Fifth Amendment privilege to refuse to execute the direction form. See *Marchetti* v. *United States,* 390 U.S. 39, 53 (1968).

In sum, the only possibility of incrimination arises from the records themselves and any other evidence provided by the bank, as to which there is no privilege, not from petitioner's execution of the direction form. Allowing petitioner to stand in the way of production by refusing to execute the form would permit him, in effect, to create for himself a Fifth Amendment privilege in bank records by banking in a foreign country with a bank secrecy law. Vindication of Fifth Amendment interests does not require that result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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